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NOTES

Exemption of ERISA Benefits Under Section 522(b)(2)(A) of the Bankruptcy Code

When a party commences a bankruptcy action, a bankruptcy estate is created which will later be distributed to the bankrupt's creditors. This estate generally includes "all legal or equitable interests of the debtor in property as of the commencement of the case." A debtor is permitted to retain only property that is either "excluded" or

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1. The exclusions and exemptions discussed in this Note, which are provided for in chapter 5 of the Bankruptcy Code, are available regardless of whether the debtor is filing under chapter 7 (liquidation), chapter 11 (reorganization) or chapter 13 (adjustment of debts of an individual with regular income) of the Bankruptcy Code. See 2 Collier Bankruptcy Manual § 103.02 (L. King 3d ed. 1979). Because pension benefits accrue to individuals, the issue discussed in this Note will normally arise only under a chapter 7 or 13 bankruptcy. Usually the issue arises in the context of a chapter 7 bankruptcy, in which the property of the debtor is collected, liquidated, and distributed to her creditors, and the debtor's debts are discharged.

   (a) the commencement of a case under [sic] section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located:
      (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

3. 11 U.S.C. § 541(a)(1) (1982) accommodates two exceptions, provided for in § 541(b) and § 541(c)(2). The § 541(b) exception is discussed fully below. See notes 8-15 infra and accompanying text. Section 541(b) excludes from property of the estate "any power that the debtor may only exercise solely for the benefit of an entity other than the debtor" and is not relevant to the issue presented in this Note.


Congress intended that the bankruptcy estate be as all-encompassing as the language indicates. The legislative history of § 541(a)(1) states:

The scope of this paragraph is broad. It includes all kinds of property, including tangible or intangible property, causes of action . . . and all other forms of property currently specified in section 70a of the Bankruptcy Act . . . [I]t includes as property of the estate all property of the debtor, even that needed for a fresh start.


“exempted” from the estate.\textsuperscript{5} A qualified pension and profit sharing fund created under the Employee Retirement Income Security Act (ERISA)\textsuperscript{6} constitutes an “interest in property” and will be distributed to creditors unless either excluded or exempted.\textsuperscript{7} Section 541(c)(2) of the Bankruptcy Code\textsuperscript{8} excludes a narrow class of property.\textsuperscript{9} It provides that “[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.”\textsuperscript{10} The legislative history under the old Bankruptcy Act exempt property never entered the bankruptcy estate, under the current Act it is initially included, subject to subsequent exemption. 41 Bankr. at 896.

Section 70(a)(5) of the old Bankruptcy Act provided:

(a) The trustee of the estate of a bankrupt . . . shall . . . be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition [to] . . . (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded or sequestered . . . .

11 U.S.C. § 110(a)(5) (1976) (current version at 11 U.S.C. § 541(a)(1) (1982)). The policies of the old Bankruptcy Act were to secure for the benefit of creditors everything of value that the bankrupt possessed in alienable or leviable form, and to allow the bankrupt an unencumbered fresh start. Goff v. Taylor, 706 F.2d 574, 578 (5th Cir. 1983). Under the old Act the courts in each case examined the legal nature of the asset in light of the conflicting purposes of the Bankruptcy Act to determine whether or not the asset would be included in the estate. 706 F.2d at 578. The Supreme Court developed the rule that when property was “sufficiently rooted in the prebankruptcy past and so little entangled with the bankrupt’s ability to make an unencumbered fresh start” it should be property of the estate. Segal v. Rochelle, 382 U.S. 375, 380 (1966).

Under the current Bankruptcy Code most pension plan funds, of any type, are included in the estate. Barr v. Hinshaw (In re Hinshaw), 23 Bankr. 233, 234 (Bankr. D. Kan. 1982); see, e.g., In re Howerton, 21 Bankr. 621 (Bankr. N.D. Tex.) (IRAs), supplemented by, 23 Bankr. 58 (Bankr. N.D. Tex. 1982). However, under the old Code, pension plan funds were generally not property of the estate because they were understood to be a substitute for future wages. Hinshaw, 23 Bankr. at 234; see Turpin v. Wente, 644 F.2d 472 (5th Cir. 1981); Mason v. Eastman Kodak Co., 473 F. Supp. 746 (W.D.N.Y. 1979). But see Judson v. Witlin, 640 F.2d 661 (5th Cir. 1981) (Keogh plan); In re Mace, 4 BANKR. CT. DEC. (CRR) 94 (Bankr. D. Or. 1978) (IRA plan); In re Wilson, 3 BANKR. CT. DEC. (CRR) 844 (Bankr. N.D. Tex. 1977) (stock savings plan).

5. Exempted property initially enters the estate and is subsequently removed, whereas excluded property never enters the estate. See Goff v. Taylor, 706 F.2d 574, 579 (5th Cir. 1983).


7. Several courts have directly addressed the issue of whether qualified ERISA plans are excluded or become property of the bankruptcy estate. See Samore v. Graham, 726 F.2d 1268 (8th Cir. 1984); Clotfelter v. CIBA-GEIGY Corp. (In re Threewit), 20 Bankr. 434 (Bankr. D. Kan.), red., 24 Bankr. 927 (D. Kan. 1982); In re Watson, 13 Bankr. 391 (Bankr. M.D. Fla. 1981). Other courts have simply accepted the proposition that such plans are property of the estate and have focused instead on the issue of whether or not such plans may be exempted (as opposed to excluded) from the estate. See In re Pruitt, 30 Bankr. 330 (Bankr. D. Colo. 1983); Barr v. Hinshaw (In re Hinshaw), 23 Bankr. 233 (Bankr. D. Kan. 1982); In re Kochell, 26 Bankr. 86 (Bankr. W.D. Wis. 1982), affd., 31 Bankr. 139 (W.D. Wis. 1983), affd., 732 F.2d 564 (7th Cir. 1984); see also In re Donaghy, 11 Bankr. 677 (Bankr. S.D.N.Y. 1981) (pension plan qualified under 26 U.S.C. § 401); Joelson v. Tiffin Sav. Bank (In re Everhart), 11 Bankr. 770 (Bankr. N.D. Ohio 1981) (same).


9. This exclusion is expressly accommodated in § 541(o)(1), see note 2 supra, and § 541(o)(1), see note 10 infra.

10. 11 U.S.C. § 541(c)(2) (1982). Generally, a restriction on the transfer of the debtor's interest in property will not prevent the inclusion of such a property interest in the estate. 11 U.S.C. § 541(c)(1) (1982) provides:
assumes that this section applies only to spendthrift trusts. Most courts that have considered the question have concluded that ERISA pension plans are property of the estate. Some courts have concluded that section 541(c)(2) was not intended to exclude ERISA benefits, and that they never constitute traditional spendthrift trusts of the sort Congress intended to exclude. Other courts have examined the

(c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision —

(A) that restricts or conditions transfer of such interest by the debtor . . .

The legislative history explains the above provision:

Subsection (c) invalidates restrictions on the transfer of property of the debtor, in order that all of the interests of the debtor in property will become property of the estate. The provisions invalidated are those that restrict or condition transfer of the debtor's interest . . . .


To the extent they conflict, the Bankruptcy Code takes precedence over ERISA, which, under 29 U.S.C. § 1056(d)(1) (1982), requires that each plan state that benefits provided under the plan may not be assigned or alienated. ERISA explicitly states that "[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States." 29 U.S.C. § 1144(d) (1982); see Samore v. Graham (In re Graham), 24 Bankr. 305, 309 (Bankr. N.D. Iowa 1982), aff'd., 726 F.2d 1268 (8th Cir. 1984).

Most courts agree that the statutorily mandated restrictions on alienation and assignment in ERISA plans, see notes 25-26 infra and accompanying text, do not prevent them from becoming property of the estate. See In re Kelley, 31 Bankr. 786, 787 (Bankr. N.D. Ohio 1983); Firestone v. Metropolitan Life Ins. Co. (In re Di Piazza), 29 Bankr. 916, 918 (Bankr. N.D. Ill. 1983); Graham, 24 Bankr. at 309; see also Regan v. Ross, 691 F.2d 81, 83-84 (2d Cir. 1982) (state statute prohibiting alienation and assignment of state pension benefits does not prevent them from becoming property of the estate, nor does qualification under 26 U.S.C. § 401); In re Wood, 23 Bankr. 552, 560 (Bankr. E.D. Tenn. 1982) (restrictions do not prevent benefits from being paid over to a chapter 13 trustee under 11 U.S.C. § 1323(b)). But see note 15 infra and accompanying text.

11. A classic spendthrift trust is a trust "intended to secure the trust fund against the improvidence of the cestui que trust (beneficiary) by protecting it against his creditors and rendering it inalienable by him before payment . . . ." 89 C.J.S. Trusts § 26 (1955).

H.R. REP. No. 595 at 176, reprinted in 1978 U.S. CODE CONG. & AD. NEWS at 6136, supra note 4, compares the then proposed Code (the current Code) with the old Act:

The bill also continues over the exclusion from property of the estate of the debtor's interest in a spendthrift trust to the extent the trust is protected from creditors under applicable State law. The bankruptcy of the beneficiary should not be permitted to defeat the legitimate expectations of the settlor of the trust.

(footnote omitted). The Senate Report also explains that § 541(c)(2) "preserves restrictions on a transfer of a spendthrift trust . . . enforceable [under] nonbankruptcy law." S. REP. No. 989 at 83, reprinted in 1978 U.S. CODE CONG. & AD. NEWS at 5869, supra note 4. The Senate version, which was ultimately rejected in favor of the House version, limited the exclusion to the extent "reasonably necessary for the support of a debtor and his dependents." Id.


First, these courts argued that the legislative history of § 541(c)(2) is "limited in its application to true spendthrift trusts, as distinguished from ERISA-type trusts." In re Kelley, 31 Bankr. 786, 788 (Bankr. N.D. Ohio 1983). ERISA provides that its provisions do not affect the operation of other federal statutes, thus ERISA-required anti-alienation clauses do not prevent
particular ERISA plan before them to determine whether or not it constitutes a spendthrift trust under state law and thus is excludable.\textsuperscript{14} Another set of courts, however, have held that section 541(c)(2) provides a broader exclusion that allows a court to exclude ERISA funds from the estate regardless of whether or not they constitute spendthrift trusts.\textsuperscript{15} The issue of whether or not ERISA funds may be excluded the inclusion of pension benefits in a debtor's bankruptcy estate. Samore v. Graham, 726 F.2d at 1273. Second, these courts argue that "a construction of Section 541(c)(2) which excludes a debtor's interest in an ERISA-type trust from property of the estate would render the federal exemption contained in 11 U.S.C. § 522(d)(10)(E)(iii) meaningless." In re Kelley, 31 Bankr. 786, 788 (Bankr. N.D. Ohio 1983); see Samore v. Graham, 726 F.2d at 1272; Regan v. Ross, 691 F.2d at 86.


14. See Goff v. Taylor, 706 F.2d 574, 586 (5th Cir. 1983) ("While pensions might be excludable from the property of the estate pursuant to section 541(c)(2), the state law exemption, their exclusion under that section is provided solely by state spendthrift trust law and not by the operation of ERISA."). (footnote omitted); In re LaFata, 3 BANKR. L. REP. (CCH) ¶ 70,020, at 85,773 (Bankr. E.D. Mich. Sept. 7, 1984); Firestone v. Metropolitan Life Ins. Co. (In re Di Piazza), 29 Bankr. 916, 918-22 (Bankr. N.D. Ill. 1983); Samore v. Graham (In re Graham), 24 Bankr. 305, 310-11 (Bankr. N.D. Iowa 1982), aff'd., 726 F.2d 1268 (8th Cir. 1984); Avery Fed. Sav. & Loan Assn. v. Klayer (In re Klayer), 20 Bankr. 270, 272-74 (Bankr. W.D. Ky. 1981). In all of the above cases, however, the court found that there was no valid spendthrift trust under state law. See also Warren v. G.M. Scott & Sons (In re Phillips), 34 Bankr. 543, 546 (Bankr. S.D. Ohio 1983) (noting in dicta that under Ohio law ERISA plans might be considered spendthrift trusts); In re Wood, 23 Bankr. 552, 555 (Bankr. E.D. Tenn. 1982) (chapter 13 case noting in dicta that the court "finds persuasive and accepts the Plan's argument [in the context of a chapter 7 case] that ERISA's anti-alienation language calls for treating a qualified plan like a spendthrift trust under state law").

State law is the proper law under which to determine whether or not a particular plan creates a spendthrift trust. Samore v. Graham (In re Graham), 24 Bankr. 305, 310 n.4 (Bankr. N.D. Iowa 1982), aff'd., 726 F.2d 1268 (8th Cir. 1984); see In re Clark, 18 Bankr. 824, 830 (Bankr. E.D. Tenn. 1982).

15. See Clotfelter v. CIBA-GEIGY Corp., 24 Bankr. 927 (D. Kan. 1982); Warren v. G.M. Scott & Sons (In re Phillips), 34 Bankr. 543, 544-46 (Bankr. S.D. Ohio 1983); In re Pruitt, 30 Bankr. 330 (Bankr. D. Colo. 1983); In re Rogers, 24 Bankr. 181 (Bankr. D. Ariz. 1982). The court in Clotfelter held that § 541(c)(2) excludes from the bankrupt's estate all trusts that bar creditors from reaching a beneficiary's interest, and thus the court excluded ERISA funds. The court presented three arguments. First, since Congress did not choose to use the term "spendthrift trust" in the language of the section itself, there is no reason to suppose that when the term appears in the legislative history it should be taken as a term of art; it is more reasonable to suppose that the term should be given its ordinary, more general meaning as "inclusive of all trusts which bar creditors from reaching a beneficiary's interest . . . ." 24 Bankr. at 929 (quoting 76 AM. JUR. 2D Trusts § 148 (1975)). Second, under nonbankruptcy law a debtor's interest in an ERISA plan is beyond the reach of creditors. 24 Bankr. at 929. Finally, the § 522(d)(10)(E) exemption for ERISA plans, see note 108 infra, merely overlaps with
from the estate under section 541(c)(2) is beyond the scope of this Note, which focuses instead on whether or not ERISA funds may be *exempted* from the estate under section 522(b)(2)(A), assuming arguendo that they cannot be excluded. If ERISA funds are *excluded* from the bankruptcy estate, then the issue of whether or not ERISA funds may be *exempted* from the estate is never reached.

The Bankruptcy Act provides for two exemption schemes, a federal scheme and a state scheme, and generally allows a debtor in any given case to choose between the two. If the federal scheme is elected, one of the federal bankruptcy exemptions allows a debtor to exempt her ERISA funds "to the extent reasonably necessary for the support of the debtor and any dependent of the debtor," unless certain other conditions are not met. Nevertheless, the Bankruptcy Act allows a state to "opt out" of the federal bankruptcy exemption scheme, and in states that exercise that option, a debtor may not

\[\text{§ 541(c)(2) and its existence does not indicate that § 541(c)(2) cannot operate to exclude ERISA funds from the estate. 24 Bankr. at 929-30. For a criticism of the reasoning in Clotfelter, see Firestone v. Metropolitan Life Ins. Co. (In re Di Piazza), 29 Bankr. 916, 921 (Bankr. N.D. Ill. 1983). The court in Phillips also argued that its holding was supported by public policy, which was to ensure that beneficiaries of retirement plans reap the ultimate benefits upon retirement. 34 Bankr. at 545-46.}\]

16. 11 U.S.C. § 522(b) (1982) provides:

(b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate either —

(1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,

(2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition . . . .

The rational debtor obviously will elect the system that will permit her to retain a larger share of her assets. This will depend upon the type of property held by the debtor and the state exemptions available to her. Should the debtor make an improvident election, she may petition to change her election, or the court on its own motion, in the interest of justice, may change her election. See, e.g., H.R. REP. No. 595 at 360, reprinted in 1978 U.S. CODE CONG. & AD. NEWS at 6316, supra note 4.

17. 11 U.S.C. § 522(d)(10)(E) (1982); see note 112 infra. Thus the issue addressed in this Note will arise only when the ERISA funds are not excluded from the estate under § 541(c)(2), and the debtor has elected (or the state has elected for her by opting out of the federal exemptions) the state exemptions.

18. See 11 U.S.C. § 522(b)(1) (1982), which allows the debtor to elect to exempt property specified under § 522(d) "unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize."

elect federal exemptions, but instead must rely on the state exemption scheme. If a debtor elects the state exemption scheme, or state law precludes her from electing the federal scheme, section 522(b)(2)(A) entitles her to exempt any property that is exempt under state law and "any property that is exempt under Federal law, other than subsection (d) of this section."20 Whereas subsection (d) of section 522 catalogues the federal bankruptcy exemptions, subsection (b)(2)(A) identifies the "federal nonbankruptcy exemptions," which are so called because they are grounded on federal law other than the Bankruptcy Code.21

Thus the ERISA funds of a debtor who elects the state exemption scheme, or whom state law prevents from electing the federal scheme, might be exempted in two ways. First, the applicable state law may afford an exemption.22 Second, section 522(b)(2)(A) may exempt them if an appropriate federal nonbankruptcy statute that exempts ERISA funds exists. The legislative history of section 522(b)(2)(A) lists some of the statutes that Congress considered to be exempting nonbankruptcy statutes, but ERISA is not among them.23


In addition, Minnesota enacted a statute that prevents a debtor from claiming any of the federal bankruptcy exemptions of § 522(d) for a period of three years from the date of the filing of an individual bankruptcy petition by the debtor's spouse if the spouse claimed any exemption pursuant to Minnesota law. MINN. STAT. § 550.371 (1982).

The opt-out provision itself has been the subject of heated legal controversy. The provision has been challenged as delegating too much power to the states and as creating an exemption scheme too nonuniform to be constitutional. Another issue raised by the provision is whether or not the exemptions of a given state can be so at odds with federal policy as to be invalid under the supremacy clause. States opting out of the federal exemptions may frustrate Congress's fresh start policy. See, e.g., Haines, Section 522's Opt-Out Clause: Debtors' Bankruptcy Exemptions in a Sorry State, 1983 ARIZ. ST. L.J. 1; Note, Federal Exemptions and the Opt-Out Provisions of Section 522: A Constitutional Challenge, 58 IND. L.J. 143 (1982).

23. The illustrative list is as follows:
Foreign Service Retirement and Disability payments, 22 U.S.C. § 1104;
Social security payments, 42 U.S.C. § 407;
Injury or death compensation payments from war risk hazards, 42 U.S.C. § 1717;
Wages of fishermen, seamen, and apprentices, 46 U.S.C. § 601;
Civil service retirement benefits, 5 U.S.C. §§ 729, 2265;
Longshoremen's and Harbor Workers' Compensation Act death and disability benefits, 33 U.S.C. § 916;
Railroad Retirement Act annuities and pensions, 45 U.S.C. § 228(L);
Veterans benefits, 45 U.S.C. § 352(E);
Special pensions paid to winners of the Congressional Medal of Honor, 38 U.S.C. § 3101;
Two federal laws may provide the basis for the exemption of ERISA funds under section 522(b)(2)(A). The first, an ERISA provision, requires that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." The second, a tax provision, requires that a trust, in order to qualify for tax-exempt treatment, provide "that benefits provided under the plan may not be assigned or alienated." The Treasury Regulation interpreting the tax provision requires that a plan provide that benefits "may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process."

The courts have split on the issue of whether or not these two statutes constitute exempting statutes under section 522(b)(2)(A). In Samore v. Graham, the Eighth Circuit held that the two statutes are not exempting statutes and in Goff v. Taylor, the Fifth Circuit expressed agreement. These courts found the exclusion of ERISA from the list of exempting statutes in the legislative history to be highly probative of the fact that Congress did not intend to exempt ERISA funds under section 522(b)(2)(A). The lower court in Graham concluded that the ERISA provisions, unlike the listed statutes, did not protect ERISA funds from involuntary assignment, and thus should

and

Federal homestead lands on debts contracted before issuance of the patent, 43 U.S.C. § 175.

24. Either statute alone may provide the basis for the argument that ERISA funds are exempt under § 522(b)(2)(A). It is irrelevant which statute is relied upon because they are substantively similar; both prohibit the assignment and alienation of ERISA benefits. See text accompanying notes 25-28 infra.
27. This regulation also interprets § 1056(d). See note 83 infra and accompanying text.
29. Throughout the Note these two statutes will be jointly referred to as the "ERISA provisions" or the "ERISA statutes."
30. 726 F.2d 1268 (8th Cir. 1984), affg. 24 Bankr. 305 (Bankr. N.D. Iowa 1982).
31. 706 F.2d 574 (5th Cir. 1983). The issue in Goff was whether or not § 541(c)(2) excluded ERISA funds from property of the estate. The court examined § 522(b)(2)(A) to aid its determination of the scope of § 541(c)(2)'s exclusion. Concluding that § 522(b)(2)(A) did not exempt ERISA funds, the court argued that "Congress did not intend to do ambiguously in Section 541 that which it clearly did not do directly in Section 522, although Section 522 explicitly addresses the extent to which other 'Federal law' and retirement benefit exemptions would be recognized." 706 F.2d at 582.

As this Note was going to print, decisions were handed down in two new cases directly on point. Both relied solely upon the reasoning in Goff and Graham, and held that ERISA benefits were not exempted under § 522(b)(2)(A). See Lichstrahl v. Bankers Trust, 750 F.2d 1488 (11th Cir. 1985); Rodgers v. Norman (In re Crenshaw), 44 Bankr. 30 (Bankr. N.D. Ala. 1984).
32. See note 45 infra.
not be included under section 522(b)(2)(A).\(^{33}\) Furthermore, both
courts of appeals argued that the property exempted by the listed sta­tutes was peculiarly public in nature while ERISA funds were pri­vate.\(^{34}\) In opposition to Goff and Graham, the bankruptcy court for
the District of Kansas held, in Barr v. Hinshaw,\(^{35}\) that the two statutes
are exempting statutes under section 522(b)(2)(A). This court
compared the ERISA statutes' prohibitions on alienation with those of the
statutes listed in the legislative history, and found them sufficiently
similar to conclude that Congress intended an analogous federal ex­
emption for ERISA plans.\(^{36}\)

This Note argues that the two federal statutes are exempting stat­
tutes under section 522(b)(2)(A), and thus ERISA funds should be ex­
empt in a bankruptcy action when the debtor uses the state exemption
scheme. Part I argues that standard principles of statutory interpreta­
tion, as applied to the language of the bankruptcy statute, refute the
possibility that Congress intended the list of statutes in the legislative
history to be exclusive. Having established that statutes other than
those listed may be included under section 522(b)(2)(A), Part II first
refutes the argument that the absence of ERISA from the list of ex­
empting statutes implies that ERISA was not intended to be an ex­
empting statute. Part II then compares the ERISA provisions with
the listed statutes, considering both the extent to which they protect
property from creditors and the nature of the property they protect,
and concludes that it is consistent with congressional intent to treat
the two ERISA statutes as exempting statutes. Part III argues that
the policy objectives of both ERISA and the Bankruptcy Code will be
served only by interpreting section 522(b)(2)(A) as providing an ex­
emption for ERISA funds.

I. PRINCIPLES OF STATUTORY INTERPRETATION: NON­
EXCLUSIVITY OF THE LIST

The absence of ERISA from the list of exempting statutes in the
Bankruptcy Code's legislative history does not conclusively show that
ERISA is not an exempting statute within the contemplation of sec­
tion 522(b)(2)(A), because the legislative history does not purport to
offer a complete list of exempting statutes. In the Senate Report, the
precise language preceeding the list is "[s]ome of the items that may be
exempted under Federal laws other than title 11 include . . . ."\(^{37}\) The

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33. Samore v. Graham (In re Graham), 24 Bankr. 305, 312 (Bankr. N.D. Iowa 1982), affd., 726 F.2d 1268 (8th Cir. 1984); see notes 58-64 infra and accompanying text.
34. Graham, 726 F.2d at 1274; Goff, 706 F.2d at 585-86; see notes 94-98 infra and accompanying text.
36. 23 Bankr. at 235; see notes 67-70 infra and accompanying text.
37. S. REP. No. 989 at 75, reprintd in 1978 U.S. CODE CONG. & AD. NEWS at 5861, supra
note 4 (emphasis added).
House Report uses similar language. In *American Surety Co. v. Marotta*, the Supreme Court recognized that “...in definitive provisions of statutes and other writings, 'include' is frequently, if not generally, used as a word of extension or enlargement rather than as one of limitation or enumeration.” Courts should look to the context of the word to determine whether or not it is a word of extension. Within the context of the phrase “some of the items ... include,” the word “include” clearly is a word of extension rather than one of limitation.

Furthermore, the statutory rules of construction for the Bankruptcy Code state that “'includes' and 'including' are not limiting.” The legislative history states that this rule is a codification of *American Surety Co. v. Marotta*. Therefore, Congress surely had the principle of interpretation announced in that case in mind when it prepared the legislative history for the Bankruptcy Code.

Thus it seems clear that statutes other than those listed in the legislative history may be included under section 522(b)(2)(A). Part II demonstrates that the ERISA statutes are among those that come within the intent of that section.

**II. LEGISLATIVE INTENT: INCLUSION OF ERISA WITHIN SECTION 522(b)(2)(A)**

**A. Exclusion of ERISA from List of Statutes in the Legislative History**

The *Goff* and *Graham* courts, although not arguing that the list in the legislative history was exclusive, did find the absence of ERISA from that list probative of a congressional intent that ERISA not be an exempting statute. The *Goff* court considered the prominence and

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38. H.R. REP. No. 595 at 360, reprinted in 1978 U.S. CODE CONG. & AD. NEWS at 6316, *supra* note 4 (“If the debtor chooses the latter, some of the items that may be exempted under other Federal laws include ... .") (emphasis added).

40. 287 U.S. at 517.
41. See 287 U.S. at 517.
44. It should be noted that although the circuit courts in *Goff* and the bankruptcy and appellate courts in *Graham* found the absence of ERISA from the list probative of a congressional intent to exclude ERISA from § 522(b)(2)(A), see note 45 *infra*, none of those courts found that the list was meant to be exclusive. Indeed, the appellate court in *Graham* stated that “the above list was not meant to be exclusive.” Samore v. Graham, 726 F.2d 1268, 1274 (8th Cir. 1984).
45. *Goff v. Taylor*, 706 F.2d 574, 585 (5th Cir. 1983) (“[I]t is highly improbable that Congress intended [the inclusion of ERISA-qualified plans] without mention in the Section 522(b)(2)(A) exemption in the midst of a listing of significantly less comprehensive and less well known statutes."); Samore v. Graham (*In re Graham*), 24 Bankr. 305, 311-12 (Bankr. N.D. Iowa 1982) (“Even though ERISA was in effect at the time the Bankruptcy Code was debated and passed, ERISA is notably absent from the listing of other federal exemptions.") *aff'd*, 726 F.2d
extensive reach of ERISA, and the fact that Congress did refer to ERISA explicitly when it wanted to do so elsewhere in the Bankruptcy Code. The Court concluded:

Certainly, therefore, Congress did not "overlook" ERISA. Given the extensive and general reach of ERISA-qualified plans, it is highly improbable that Congress intended their inclusion without mention in the Section 522(b)(2)(A) exemption in the midst of a listing of significantly less comprehensive and less well known statutes.

A careful examination of the list suggests Congress may well have "overlooked" ERISA. First, in two instances the subject area listed in the legislative histories does not correspond to the actual subject matter of the cited statute, suggesting that the list was not painstakingly drafted. Second, in two instances the legislative histories list statutes that were repealed prior to 1977, the date when the first congressional report was issued. The Civil Service Retirement Benefit statute was repealed in 1966 and the Foreign Service Retirement and Disability statute was repealed in 1974. Both of these statutes were replaced by similar statutes, but the legislative history does not provide cites to those statutes. If the list was so outdated that it included statutes repealed in 1966 and 1974, the absence of ERISA, which was not even enacted until 1974, probably indicates nothing more than that Congress overlooked it.

Additionally, if Congress had not overlooked ERISA but had intended to exclude it, Congress could easily have expressed such an intent in the statute's text or legislative history. Congress' silence, coupled with its cursory compilation of the list, probably indicates that it did not explicitly consider the issue at all.

Furthermore, courts often assert that it may be treacherous to em-

1268, 1274 (8th Cir. 1984) ("[W]e find the failure of Congress to include ERISA plan benefits probative of Congressional intent that ERISA was not a 'Federal law' upon which a § 522(b)(2)(A) exemption could be based.").

46. See Goff v. Taylor, 706 F.2d 574, 585 (5th Cir. 1983).
47. 706 F.2d at 585.
49. Goff v. Taylor, 706 F.2d 574, 585 (5th Cir. 1983).
50. See note 62 infra.
51. See note 23 supra; note 62 infra.
52. This seems especially likely in light of the fact that this issue arises only under very narrowly defined circumstances: when the ERISA funds are not excluded from the estate under
phasize unduly congressional silence in interpreting statutes. Thus great weight should not be attached to Congress’ failure to include ERISA in the illustrative list. Yet this is precisely what the Goff and Graham courts did. The Goff court realized this problem and attempted to distinguish the instant case from the general rule by stating that this “often-stated admonition . . . does not apply in this case in light of the comprehensive consideration of this issue which is revealed by this history.” It is unclear exactly what issue the court considers to have been comprehensively considered. Clearly the relevant issue, whether or not Congress intended ERISA to be an exempting statute, was not explicitly considered in the history at all.

If in fact Congress did not consider whether or not ERISA was to be an exempting statute, that does not mean that section 522(b)(2)(A) cannot extend to include ERISA. Statutes are not limited to the specific examples in the minds of legislators at the time of passage. When it appears that Congress did not actually consider the example before the court, the court must determine how Congress would have voted had the question been raised legislatively. As the remainder of Part II and Part III of this Note indicate, Congress would likely have included ERISA within section 522(b)(2)(A) had it considered the question.

B. Comparison of ERISA Provisions with Listed Statutes: Restrictions on Involuntary Assignments

The bankruptcy court in Graham, after noting the absence of ER-
ISA from the listed provisions, proceeded to argue that the language of the ERISA provisions is narrower than that of the listed statutes because it does not protect funds from involuntary assignment. The court concluded that this indicates that Congress did not intend to include ERISA as an exempting statute. ERISA literally prohibits only "assignment and alienation." The court contrasted this language with that in the statute exempting Civil Service Retirement benefits, in which Congress explicitly exempted the benefits from creditors:

(a) The money mentioned by this subchapter is not assignable either in law or equity ... or subject to execution, levy, attachment, garnishment, or other legal process, except as otherwise may be provided by Federal laws.

The court incorrectly concluded that although the listed statutes exempt the benefits they cover from creditors' nonbankruptcy actions, the ERISA provisions do not. In support, the court argued that had Congress intended ERISA funds to be protected from creditors, a more expansive provision, similar to the provisions in the listed statutes, could have been included in the legislation. Congress' failure

61. 24 Bankr. at 312.
62. See 5 U.S.C. § 2265(a) (1964) (replacing 5 U.S.C. § 729) (repealed 1966; current version at 5 U.S.C. § 8346(a) (1982), is substantively similar) (“None of the moneys mentioned in this chapter shall be assignable, either in law or equity, or be subject to execution, levy, attachment, garnishment, or other legal process.”) (civil service retirement benefits); 22 U.S.C. § 1104 (1976) (repealed 1980; current version at 22 U.S.C. § 4060(c) (1982), is substantively similar) (“None of the moneys mentioned in this subchapter shall be assignable either in law or equity, or be subject to execution, levy, attachment, garnishment, or other legal process ...”) (foreign service retirement and disability payments); 33 U.S.C. § 916 (1976) (current version same) (“No assignment, release, or commutation of compensation or benefits due or payable under this chapter, except as provided by this chapter, shall be valid, and such compensation and benefits shall be exempt from all claims of creditors and from levy, execution, and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived.”) (longshoremen's and harbor workers' death and disability payments); 38 U.S.C. § 3101(a) (1976) (current version same) (“Payments of benefits due or to become due under any law administered by the Veterans' Administration shall not be assignable except to the extent specifically authorized by law, ... shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever ...”) (veterans' benefits); 42 U.S.C. § 407 (1976) (current version same) (“The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.”) (social security payments); 42 U.S.C. § 1717 (1976) (current version same) (“The right of any person to any benefit ... shall not be transferable or assignable at law or in equity except to the United States, and none of the moneys paid or payable ... , or rights existing under said subchapter, shall be subject to execution, levy, attachment, garnishment, or other legal process or to the operation of any bankruptcy or insolvency law.”) (war-risk hazard compensation for injury or death or detention of employees of contracts with the United States); 43 U.S.C. § 175 (1976) (current version same) (“No lands ... shall in any event become liable to the satisfaction of any
to include a more expansive provision in the statute led the court to conclude "that an ERISA fund is not within the exemption from the bankruptcy estate provided by other federal law under § 522(b)(2)(A)." 64

The court in Barr v. Hinshaw also compared the ERISA statutes with the listed statutes, but reached the opposite conclusion. 65 This court found that "the similarity between the provisions of those statutes that are recognized as constituting a federal exemption and the provisions of 29 U.S.C. § 1056 and 26 U.S.C. § 401(a)(13) (and the accompanying Treasury Regulation) supports a conclusion that a federal exemption for ERISA plans was intended." 66 The courts reached opposite conclusions because the court in Hinshaw understood that the prohibition on assignment and alienation in the ERISA provisions 67 had the same meaning as the language in the other statutes, 68 whereas the bankruptcy court in Graham did not. 69 In other words, the court in Hinshaw recognized that the ERISA provisions prohibit involuntary as well as voluntary assignments, but the bankruptcy
debt contracted prior to the issuing of the patent therefor.”) (federal homestead lands); 45 U.S.C. § 228(l) (1970) (repealed 1974; current version at 45 U.S.C. § 231m (1982), is almost identical) ("no annuity or pension payment shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated") (Railroad Retirement Act); 45 U.S.C. § 352(e) (1976) (current version same) ("no benefits shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever") (railroad unemployment insurance); 46 U.S.C. § 601 (1976) (current version same) ("No wages . . . shall be subject to attachment or arrestment from any court, and every payment . . . shall be valid in law, notwithstanding any previous sale or assignment of wages or of any attachment, encumbrance, or arrestment thereon.") (fishermen's and merchant seamen's wages).

64. 24 Bankr. at 312.
None of the moneys mentioned in this subchapter shall be assignable either in law or equity, or be subject to execution, levy, attachment, garnishment, or other legal process. . . .
The right of any person to any future payment under this subchapter shall not be transferrable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment or other legal process, or to the operation of any bankruptcy or insolvency law.
42 U.S.C. § 407 (1976), cited in Hinshaw, 23 Bankr. at 235. Note the similarity between the provisions used as examples by the Hinshaw court and the one used by the Graham court. See text at note 60 supra.
66. 23 Bankr. at 235.
67. See notes 25-28 supra and accompanying text.
68. See note 62 supra.
court in _Graham_ thought that the ERISA provisions prohibit only voluntary assignments. Thus, the bankruptcy court’s argument in _Graham_ will be refuted if it can be shown that the ERISA provisions prohibit involuntary as well as voluntary assignments; i.e., that they protect the funds from creditors’ actions.

In the context of nonbankruptcy creditor actions, a majority of courts have interpreted the language of the ERISA provisions to prohibit involuntary, as well as voluntary, assignment and alienation even though a literal reading of the statutes would not preclude an involuntary diversion of pension benefits. In reaching this conclusion, a number of courts have examined the legislative history of ERISA, which provides that

a plan must provide that benefits under the plan may not be assigned or alienated. However, the plan may provide that after a benefit is in pay status, there may be a voluntary revocable assignment (not to exceed 10 percent of any benefit payment) by an employee which is not for purposes of defraying the administrative costs of the plan. For purposes of this rule, a garnishment or levy is not to be considered a voluntary

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The emphasized language can be read as stating that the exception permitting voluntary assignments of up to ten percent of each payment does not apply to a garnishment or levy. When the statute is read this way, one can infer that the general prohibition against assignment and alienation must apply to both voluntary and involuntary assignments: otherwise, it would be unnecessary to state explicitly that the ten percent exception does not apply to involuntary assignments, because there would be no general prohibition against involuntary assignments to which an exception could be made. When the legislative history is read as a whole it is clear that this is the correct interpretation of this section, because this history reveals that the provision for voluntary assignment of the benefits is nothing more than an exception to the general prohibition against assignment and alienation.

The policies underlying ERISA also support the conclusion that ERISA benefits may not be involuntarily assigned. Congress prohibited assignment and alienation "to protect the rights of employees and their beneficiaries" and to "ensure that the employee's accrued benefits are actually available for retirement purposes." If involuntary assignment of benefits were allowed, the statutory structure that Congress designed to protect ERISA benefits would be destroyed. Congress certainly could not have intended such a result. The district court in Cody v. Riecker reasoned that "judgment enforcing remedies such as garnishment, levy, attachment and the like can work the same
result as an intentional assignment of [sic] alienation. They can dilute the benefits established by the trust. The Hinshaw court correctly recognized that the same reasoning applies in the bankruptcy context.

Finally, the Treasury Regulation interpreting the ERISA tax qualification statute supports the argument that the language of the ERISA statutes should be interpreted as expansively as that of the listed statutes. This regulation applies to the general ERISA provision as well as to the tax qualification provision. Although the tax

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79. 454 F. Supp. 22, 24 (E.D.N.Y. 1978), affd., 594 F.2d 314 (2d Cir. 1979) (dictum in case involving obligation to support spouse, for which ERISA funds may be garnished); see also Comment, supra note 74, at 264:

If a ten percent voluntary assignment is to be permitted under the provision because the ninety percent remainder is considered to be adequate assurance of the availability of the benefit for the participant's use, there is no reason why a similar analysis should not be considered appropriate in the case of involuntary assignments. Therefore, the terms of the provision should be construed in a manner which effectuates its purpose — to prohibit the involuntary assignment of ninety percent of the employee's benefit at a minimum.


82. See Tenneco Inc. v. First Va. Bank, 698 F.2d 688, 689-70 (4th Cir. 1983) ("By virtue of the statute and the regulation, an employee's accrued benefits under such a qualified plan may not be reached by judicial process in aid of a third-party creditor."); General Motors Corp. v. Buha, 623 F.2d 455, 463 (6th Cir. 1980) ("Giving the required effect to Reg. § 1.401(a)-13, we conclude that pension plan benefits are not subject to garnishment . . . ."); Vink v. SHN N. Am. Holding Corp., 549 F. Supp. 268, 270 (S.D.N.Y. 1982) ("Taken together, these provisions [§ 1056(d) and the Treasury Regulation] prohibit both the voluntary and involuntary assignment of vested pensions."); Commercial Mortgage Ins. v. Citizens Natl. Bank, 526 F. Supp. 510, 520 (N.D. Tex. 1981) ("In light of the clear delegation to the Treasury Department of rulemaking power respecting participation standards, Congress' clear directive that Treasury regulations shall govern the employee benefit provisions of ERISA, and the pivotal role which Congress envisioned for Treasury in the statute's enforcement, Reg. § 1.401(a)-13 must provide significant support for the determination that pension plan benefits are not subject to commercial garnishment."); Christ Hosp. v. Greenwald, 82 Ill. App. 3d 1024, 1026, 403 N.E.2d 700, 702 (1980) (citing Reg. § 1.401(a)-13 as authority for the proposition that ERISA-plan benefits may not be garnished); Biles v. Biles, 163 N.J. Super. 49, 53, 394 A.2d 153, 155 (1978) (Reg. § 1.401(a)-13 supports the conclusion that ERISA prevents both voluntary and involuntary transfers of benefits).


Title I, [of ERISA] . . . contains provisions for the protection of employee benefit rights which are codified in Title 29 of the United States Code. Title II contains amendments to the Internal Revenue code regarding taxation of pension plans, which are codified in Title 26 of the Code. . . . The tax terms in Title II are closely analogous to, and almost identical to, the employee benefit provisions for pension plans set forth in Title I. Thus, Section 1056(d) in Title 29 incorporates the same assignment-alienation prohibition reflected in Section 401(a)(13) in Internal Revenue Code contained in Title 26.

The identity between Title I and Title II of ERISA is important because Congress specifically delegated to the Treasury Department, rather than to the Labor Department, authority to issue regulations concerning participation, vesting and funding standards. Congress further provided that the regulations issued by Treasury would apply as well to the analogous employee benefit sections of Title I in these areas. . . . That the relevant sections of Title I and II were drawn in identical fashion, therefore, seems clearly designed to ensure uniform results in their interpretation.

See also General Motors Corp. v. Buha, 623 F.2d 455, 461-63 (6th Cir. 1980); 29 U.S.C. § 1202(c) (1976).
qualification statute itself, like the ERISA statute, expressly prohibits only assignment and alienation, the Treasury Regulation language is similar to that used in the statutes listed in the legislative history, prohibiting anticipation, alienation, assignment, attachment, garnishment, levy, execution or other legal process. Because this regulation is legislative rather than interpretative, it is to be accorded great deference. It can be set aside only if the Secretary exceeded his statutory authority or if the regulation is 'arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with law.' The Treasury Regulation clearly passes this test.

Almost uniformly, the courts have held that the ERISA provisions prohibit involuntary assignments of ERISA benefits. Consequently, the ERISA statutes, like the listed statutes, prohibit involuntary and voluntary alienation. Therefore they should be exempting statutes under section 522(b)(2)(A).

The bankruptcy court in Graham ultimately failed to articulate a rational basis for distinguishing the ERISA statutes from the listed statutes. Even the Eighth and Fifth Circuits recognized that the bankruptcy court’s argument was unsupportable and did not rely on it. Both circuits instead attempted to distinguish the ERISA statutes from the listed statutes based on the “nature of the property” that they protect.

84. 26 U.S.C. § 401(a)(13) (1982); see text at note 26 supra.
85. 26 C.F.R. § 1.401(a)-13(b)(1) (1982); see text at note 28 supra.
86. A legislative regulation is one issued pursuant to a clear delegation of rulemaking authority. An interpretive regulation is merely the administrative agency's construction of a statute and is valid only to the extent that it correctly interprets the statute. 1 AM. JUR. 2D Administrative Law § 95 (1962); see Commercial Mortgage Ins. v. Citizens Natl. Bank, 526 F. Supp. 510, 520 n.12 (N.D. Tex. 1981).
89. General Motors Corp. v. Buha, 623 F.2d 455, 463 (6th Cir. 1980).
90. See note 71 supra and accompanying text.
91. The court in Goff stated that it did not see across-the-board differences in the explicitness of the restraints against alienation in the listed statutes and in ERISA. ... Further, whatever deficiencies might be attributed to ERISA's terse recitations, in 26 U.S.C. § 401(a)(13) and 29 U.S.C. § 1056(d)(1), at least those of the ERISA's tax provisions have been cured by virtue of the Treasury Department's interpretative regulation.
C. Comparison of ERISA Provisions with Listed Statutes: Nature of the Property

In addition to arguing that Congress' omission of ERISA from the illustrative list was probative of an intent that ERISA not be considered an exempting statute under section 522(b)(2)(A), the court in Goff also argued that ERISA should not be considered an exempting statute because the "property" covered by ERISA differed in nature from that covered by the enumerated statutes. The court noted that ERISA regulates private pension and welfare benefits, whereas the listed statutes protect public funded and/or created pension and welfare systems, or exceptional, traditionally guarded industries. The court then asserted, without further argument or support, that the "narrow characteristics of the cited statutes, rather than the broad, common trait of private pension and welfare legislation, was intended as the operative thread by which other federal statutes — overlooked or yet to be enacted — might be included." The Eighth Circuit in

93. Goff, 706 F.2d at 585.
94. Goff, 706 F.2d at 585–86. The Goff court also made an additional argument based on the supposed nature of ERISA's restraints on alienation:

[W]e do find that the contingent nature of ERISA's restraints on alienation differs markedly from the absolute prohibitions contained in the listed statutes. ERISA merely provides that as a condition of obtaining qualified status — with its attendant tax and other benefits — a pension plan must preclude alienation or assignment of its benefits. It does not prohibit pension funds from permitting alienation or assignment; rather . . . it envisions that "disqualified" plans may be formed which are still subject to ERISA's regulatory scheme . . . . 706 F.2d at 585 (emphasis in original). The court contrasted ERISA with the listed statutes, finding that "the listed statutes which establish or guarantee certain benefits directly preclude all such benefits from alienation or assignment." 706 F.2d at 585 (footnote omitted) (emphasis in original).

Whether or not there are parts of the ERISA statute that regulate pension plans that are not qualified ERISA plans is irrelevant to the issue in this Note, which is whether or not ERISA plan funds are exempt. Nowhere does this Note argue that all pension plans should be exempt. Thus, assuming arguendo that the court has drawn a valid distinction, it still has not drawn a useful one for our purposes. For a pension plan to be an ERISA qualified plan, it must prohibit alienation and assignment. This is made clear by both the tax-qualification statute, see notes 26–28 supra and accompanying text, and the general pension provision, see note 25 supra and accompanying text.

It is interesting to note that although the Eighth Circuit in Graham extracted its two arguments directly from Goff, it did not see fit to include this one. See Samore v. Graham, 726 F.2d 1268, 1274 (8th Cir. 1984).

95. These would include the following:

foreign service retirement and disability payments, social security payments, injury or death compensation payments from war risk hazards, civil service retirement benefits, Longshoremen's and Harbor Workers' Compensation Act death and disability benefits, Railroad Retirement Act annuities and pensions, veterans benefits, special pensions paid to winners of the Congressional Medal of Honor, and federal homestead lands on debts contracted before issuance of the patent.

Goff v. Taylor, 706 F.2d 574, 586 n.31 (5th Cir. 1983); see note 23 supra. The list should be altered slightly due to the errors in the legislative histories. See note 48 supra.

96. "These would include the wages of fishermen, seamen, and apprentices, as well as the Longshoremen's and Harbor Workers' Compensation Act disability benefits." Goff v. Taylor, 706 F.2d 574, 586 n.32 (5th Cir. 1983); see note 23 supra.

97. Goff v. Taylor, 706 F.2d 574, 586 (5th Cir. 1983).
Graham also partially relied on this argument to support its holding.\(^\text{98}\)

The distinction drawn by the Fifth and Eighth Circuits unjustifiably narrows the scope of section 522(b)(2)(A). The obvious "operative thread" by which statutes may be included under this section is whether or not they exempt the property that they cover from both voluntary and involuntary alienation.\(^\text{99}\) The statute includes within its scope "any property that is exempt under Federal law, other than subsection (d) of this section."\(^\text{100}\) These courts, however, would read the statute as if it said "any public funded and/or created pension and welfare benefits that are exempt under Federal law."

Courts are bound by the language of a statute and are not free to substitute legislative history for that language.\(^\text{101}\) Only if the language of the statute is ambiguous may a court look to the legislative history.\(^\text{102}\) Neither court asserted that the language of the statute was ambiguous;\(^\text{103}\) certainly there is no dispute that ERISA benefits are property.\(^\text{104}\) The only term that might be ambiguous is "exempt under Federal law," but it is difficult to comprehend how these courts, which admit that ERISA benefits are exempt from involuntary assignment, find an ambiguity. However, even assuming arguendo that this

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\(^{98}\) Samore v. Graham, 726 F.2d 1268, 1274 (8th Cir. 1984).

\(^{99}\) Some insight into what the "operative thread" is can be gained by comparing the policies behind the listed statutes with the policy underlying ERISA. For example, the Social Security Act is intended to provide a minimum level of security against the economic uncertainties of old age. H.R. Rep. No. 615, 74th Cong., 1st Sess. (1935) (Cong. Serial Set vol. no. 9887); S. Rep. No. 628, 74th Cong., 1st Sess. (1935) (Cong. Serial Set vol. no. 9879). It seems rational to assume that Congress included the prohibition against assignment, at least in part, to assure that the benefits would actually be available to provide that security. Thus, one may assume that § 522(b)(2)(A) was intended to guarantee that the Social Security Act's purpose would still be fulfilled even when creditors sought to attach the benefits in a bankruptcy, as opposed to a nonbankruptcy, action. Similarly, ERISA is intended to ensure that benefits actually are available for retirement purposes. See notes 119-24 infra and accompanying text. The prohibition against assignment was intended to ensure that benefits would be so available. Consequently, if one accepts that social security benefits are exempt under § 522(b)(2)(A) in order to fulfill Congress' purpose of ensuring that benefits actually be available, then ERISA benefits should also be exempt under § 522(b)(2)(A) in order to ensure that Congress' purpose be fulfilled.

The "operative thread" is that both statutes, by protecting the benefits from involuntary as well as voluntary assignment, ensure that the benefits they protect will actually be available. Section 522(b)(2)(A) then serves to further this goal by protecting the benefits in bankruptcy proceedings also. In this way the fortuity of whether the creditor is attempting to reach the benefits in a bankruptcy or in a nonbankruptcy action does not affect the fulfillment of Congress' purpose.


\(^{102}\) United States v. Oregon, 365 U.S. 643, 648 (1961) (when statute is clear and unequivocal on its face, there is no need to resort to legislative history); Wright v. Vinton Branch of the Mountain Trust Bank, 300 U.S. 440, 463 (1937); United States v. Missouri Pac. R.R., 278 U.S. 269, 277 (1929); Universal City Studios v. Sony Corp. of Am., 659 F.2d 963, 969 (9th Cir. 1981).

\(^{103}\) See Samore v. Graham, 726 F.2d 1268 (8th Cir. 1984); Goff v. Taylor, 706 F.2d 574 (5th Cir. 1983).

\(^{104}\) See note 7 supra and accompanying text.
term is ambiguous, the legislative history does not dictate the distinction drawn by the courts.105

Even if courts are justified in referring to the legislative history to interpret the statute, they should be careful not to read into that history a restriction that is not clearly intended. The legislative history purports only to list some of the statutes that are within the scope of section 522(b)(2)(A).106 If a court could identify other statutes that exempt private benefits from involuntary and voluntary assignment, and that were also excluded from the list, then there would at least be some basis for concluding that Congress intended for section 522(b)(2)(A) to apply only to benefits of a public nature. However, no such other statutes have been identified by the courts, nor do any leap to mind. Thus ERISA may be the only benefit scheme of a private nature to be a candidate for section 522(b)(2)(A)'s exemption. If this is true, then it is tautological to emphasize the fact that all of the listed statutes are public in nature because this would merely be a consequence of overlooking ERISA in the first place.

As the above discussion indicates, neither the Eighth nor the Fifth Circuit was any more successful than was the bankruptcy court in Graham in articulating a persuasive basis for distinguishing the ERISA statutes from those listed in the legislative history.107 Because there is no reason to conclude that the differences in the nature of the property protected by ERISA and by the listed statutes are relevant, and because both sets of statutes protect benefits from creditors in nonbankruptcy law, ERISA fits comfortably within section 522(b)(2)(A). Furthermore, as Part III explains, the policies behind both ERISA and the Bankruptcy Code suggest that ERISA funds should be exempt in bankruptcy proceedings.

III. POLICIES OF THE BANKRUPTCY CODE AND ERISA

The Bankruptcy Code has the dual purpose of converting the bankrupt's estate into cash for distribution among creditors and of providing the bankrupt with a fresh start.108 For bankruptcy to be a truly effective remedy for the consumer debtor, a fresh start must be provided109 by giving the debtor adequate exemptions and other

105. See notes 23, 37-44 supra and accompanying text.
106. See notes 37-38 supra and accompanying text.
107. It is also worth noting that in the context of determining whether or not ERISA benefits were subject to garnishment for support payments, the Second Circuit found several of the listed statutes to be analogous to ERISA. AT&T v. Merry, 592 F.2d 118, 124 n.13 (2d Cir. 1979).
Congress recognized the inadequacies of state law exemptions and sought to provide adequate exemptions through a scheme of optional federal exemptions. The federal scheme exempts tax-qualified ERISA funds to the extent reasonably necessary for the support of the debtor and her dependents. The inclusion of this exemption for ERISA funds in Congress' federal scheme demonstrates that Congress contemplated that ERISA funds may be necessary for a fresh start. Hence it is consistent with congressional intent to exempt ERISA funds even when the debtor did not elect, or could not elect the explicit federal exemptions.

It could be argued that there is greater danger in allowing an exemption under the federal "nonbankruptcy" exemption of section 522(b)(2)(A) than in allowing one under the section 522(d) bankruptcy exemptions, because section 522(d) limits the exemption to what is "reasonably necessary for the support of the debtor and any dependent." Section 522(b)(2)(A), in light of the two ERISA provisions, would authorize exemption of all ERISA funds. Thus it is possible that if ERISA funds are exempt under section 522(b)(2)(A), a person might shelter substantial sums of money in an ERISA fund, go into debt, and then declare bankruptcy shortly before the ERISA funds become payable to her. Conceivably this might be so unfair to creditors that the balance between the two Bankruptcy Code policies, protecting both debtor and creditor, should be struck in favor of the


(E) a payment under a stock bonus, pension, profit-sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless —

(i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;

(ii) such payment is on account of age or length of service; and

(iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), 408, or 409 of the Internal Revenue Code of 1954 (26 U.S.C. 401(a), 403(a), 403(b), 408, or 409).

113. See In re LaFata, 3 Bankr. L. Rep. (CCH) ¶ 70,020, at 85,773-74 (Bankr. E.D. Mich. Sept. 7, 1984) (construing § 522(b)(2)(A) so as not to exempt ERISA funds "frustrates the legislative intent to provide debtors with a fresh start in many cases").

114. See In re LaFata, 3 Bankr. L. Rep. (CCH) ¶ 70,020, at 85,774 (Bankr. E.D. Mich. Sept. 7, 1984) ("A debtor's right to reasonably necessary retirement benefits should not hinge on electing under § 522(d) rather than under § 522(b). To condition that right upon the exemption scheme elected subordinates ERISA to the Bankruptcy Code in a mindless and mechanical manner.")

115. See text at notes 20-21 supra.


117. See note 108 supra and accompanying text.
creditor in considering the treatment of ERISA funds under section 522(b)(2)(A).

There are, however, strong arguments that suggest that there is little, if any, additional burden on creditors if an exemption is allowed under section 522(b)(2)(A) rather than section 522(d). First, once it is clearly established that creditors in a bankruptcy action cannot reach ERISA funds, creditors will be on notice not to extend credit on the basis of those funds. Second, even without such a rule, it is unlikely that creditors extend credit on the basis of ERISA funds because these funds generally cannot be reached in a creditors' action, and there is no reason for a creditor to presume that she will be seeking reimbursement in a bankruptcy as opposed to a creditors' action.

The policies behind ERISA also compel the conclusion that ERISA benefits should be exempt in bankruptcy proceedings. The primary purpose of ERISA is to protect individual pension rights. Congress intended to ensure that retirement benefits actually be available for retirement purposes. With but one judicially created exception, the bill "requires the payment of benefits only to a participant in a pension plan or to a beneficiary designated by him or by the terms of the plan." The Supreme Court has recognized the actual receipt of retirement benefits as the purpose of ERISA. The purposes behind ERISA would be thwarted if ERISA funds were not exempted in bankruptcy proceedings. If Congress intended to create a narrow exception to the policy of ERISA, "that exception should be clearly expressed, and not one left to be implied from Congress' silence."

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118. See notes 71-90 supra and accompanying text.
120. H.R. REP. No. 807, 93d Cong., 2d Sess. 68, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 4670, 4734 ("To further ensure that the employee's accrued [sic] benefits are actually available for retirement purposes, the committee bill also contains a provision requiring the plan to provide that benefits may not be assigned or alienated.").
121. By virtue of the statute and the regulation, an employee's accrued benefits under such a qualified plan may not be reached by judicial process in aid of a third-party creditor. . . .
A judicial exception has been carved out of this seemingly absolute prohibition. If the debt is support due the employee's spouse or children, his interest in the plan is subject to garnishment. . . . The exception is premised upon the statute's broad purpose to provide protection for employees and their families . . .
Tenneco Inc. v. First Va. Bank, 698 F.2d 688, 689-90 (4th Cir. 1983); see note 71 supra.
123. Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 510 (1981) ("In Nachman, we observed that Congress through ERISA wanted to ensure that 'if a worker has been promised a defined pension benefit upon retirement — and if he has fulfilled whatever conditions are required to obtain a vested benefit — . . . he actually receives it.'") (quoting Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 375 (1980)).
CONCLUSION

The court in Hinshaw was correct in concluding that ERISA benefits should be exempted under section 522(b)(2)(A). The omission of the ERISA provisions from the list of exempting statutes is neither conclusive nor probative of Congress' intent as the list only purports to be partial and illustrative. Although the ERISA provisions are literally narrower than the provisions in the listed statutes, a closer examination leads to the conclusion that Congress did not intend to treat these statutes dissimilarly. The Treasury Regulation interpreting the ERISA provisions uses language as broad as that used in the other statutes. In addition, the prohibitions in the ERISA statutes have been interpreted as having the same broad meaning as those in the other statutes, prohibiting involuntary as well as voluntary alienations. Furthermore, the difference in the nature of the types of property protected is not a relevant distinction. Finally, ERISA benefits should be exempted under section 522(b)(2)(A) in order to effectuate the Bankruptcy Code's policy of providing the debtor with a fresh start and to protect the ERISA policy of ensuring that benefits actually be available for retirement.